Supreme Court, U.S.
FILED

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No. 97-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BRUCE E. GARDNER,

Petitioner,

v.

DEPARTMENT OF TREASURY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether pursuant to 5 U.S.C. §7703(a)(2), the Merit Systems Protection Board must be named the sole respondent in threshold matters involving only its procedure, regulations, or rules and whether the Court of Appeals for the Federal Circuit must exercise its exclusive jurisdiction over petitioned threshold issues pursuant to 28 U.S.C.§1295 (a)(9) and 5 U.S.C.§7703(b)(1).

II. Whether the Court of Appeals for the Federal Circuit has subject matter jurisdiction to review the Merit Systems Protection Board's sua sponte dismissal of Petitioner's mixed case and determine the correctness of the MSPB's deprivation of Petitioner's 5 U.S.C.§7702(a)(1) rights to a hearing and decision on the merits within 120 days from the date of the appeal and his 5th Amendment rights to due process.

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64 F.3d 571 (Fed.Cir. 1995)

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Significant Unpublished Orders

June 25, 1996, Order (Federal Circuit's denial of Treasury's unopposed motion to substitute MSPB as sole respondent.)

April 13, 1995 Initial Decision (MSPB sua sponte dismissal of appeal with re-filing limitations.)

April 13, 1995 Order (Motion In Limine)

April 6, 1995 Order (Denying issues 1 & 3 of Motion In Limine to exclude tax return information but not addressing issues 2,4-7.)

JURISDICTION

On June 6, 1997, the Court of Appeals for the Federal Circuit entered an Order and Judgment in Gardner v. Treasury at No.95-3770 (Fed.Cir. 1997) (hereinafter Gardner II). A1.

On June 17, 1997, petitioner filed a Motion for Reconsideration. On June 30, 1997, the Federal Circuit characterized the motion as a motion for rehearing and denied it. A26. The jurisdiction of this Court is invoked under

28 U.S.C.§1254(1).

STATUTORY PROVISIONS INVOLVED

The authority relied upon includes the 5th Amendment, the statutes listed below, and the MSPB's regulations and rules at A37-40.

1) 28 U.S.C.§1295(a)(9) states in part:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction over the MSPB's interpretations of laws, its own rules and regulations.

2) 5 U.S.C.§7702(a)(1) states in part:

> ... the Board shall, within 120 days of the filing of the appeal, decide both issues of discrimination and the appealable actions in accordance with the Board's appellate procedures ...

3) 5 U.S.C.§7703(a)(2) states in part:

> The Board shall be named respondent in any proceeding... unless [it involves] review of a final order or decision on the merits of the underlying personnel action.

4) 5 U.S.C §7703(b)(1) states in part:

> ... a petition to review a final order or final decision of the Board shall be filed in the... United States court of appeals ...

STATEMENT OF THE CASE

I. MSPB IS THE PROPER RESPONDENT WHEN IT IS RESPONSIBLE FOR THE ACTION TAKEN AGAINST APPELLANT.

The Court of Appeals for the Federal Circuit misconstrued its decision in Spruill v. MSPB, 978 F.2d 679(Fed.Cir. 1992) regarding the correct respondent in this case. Thereby, incorrectly granting standing to Treasury as respondent, when Treasury acknowledged it lacked standing as a party, by filing an unopposed motion to substitute the MSPB as the sole respondent in this case.

On June 25, 1996, the Federal Circuit, denied Treasury's unopposed motion to reform the caption and designate the MSPB as respondent in Gardner II. A3-5. Neither the MSPB nor petitioner opposed Treasury's motion which cited Spruill as the controlling case. Spruill held, the MSPB must

be the sole respondent when the petitioned issues involve its jurisdiction, procedures, rules, or regulations. Id at 685-686, 689.

In denying the unopposed motion, the Federal Circuit relied on its erred decision in Gardner v. Treasury, 64 F.3d 57 (Fed.Cir. 1995)[1](Gardner I). In Gardner I, the Board denied a whistleblowing appeal/stay request (IRA appeal), made pursuant to 5 U.S.C.§1221 (a),[2](c)(1), for lack of jurisdiction. A38.4. The Federal Circuit on its own motion substituted Treasury for the originally named MSPB respondent, and then despite §1221(h), held it lacked jurisdiction to review the MSPB decision. A38.5. In Gardner II, the court failed to acknowledge its jurisdiction over "procedural" issues, just as

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[1]The court's policy is to automatically change the name of respondent to the agency when the MSPB is named the respondent.A28-34.

[2] All references to 5 U.S.C. will be designated by "§".

it had done in Gardner I.A3-5. The threshold issues in both Gardner I and II involved the MSPB's denial of GARDNER's rights to speedy hearings and decisions, Treasury was not responsible for those actions.

II. FEDERAL CIRCUIT HAS JURISDICTION OVER MSPB DISMISSAL OF MIXED CASE.

Petitioner GARDNER was employed with the IRS for approximately 15 years. He commenced work as a General Attorney(Tax) GS-14 in the IRS Sacramento District Counsel Office in 1991. He was removed from that position on November 18, 1994 by Treasury.

On December 23, 1994, pursuant to §7701, GARDNER appealed the adverse personnel action taken against him by Treasury.A41-43. His MSPB appeal alleged racial discrimination as one reason for Treasury's removal action. The mixed appeal was never acknowledged by the Administrative Judge (AJ) as required by the MSPB's Judge's Handbook

(Handbook). A39.1. The discovery period never began because of the AJ's failure to issue an acknowledgment order in response to the mixed appeal. A40.4. The AJ did not send a notice of hearing related to the appealed mixed case to the parties as required by MSPB regulations. A37.2. Nor did the AJ ever set a hearing date for the appealed mixed case. A39.2. Furthermore, the AJ never rendered a decision on the merits of either the discrimination or non-discrimination issues prior to their dismissal. A13. Yet, on the 109th day after the MSPB appeal was filed, the AJ deliberately circumvented GARDNER's rights to a 120 day speedy decision on the merits and Congressional oversight, by dismissing the MSPB appeal on his own motion.

The AJ realized on the 102nd day after the MSPB appeal was filed, that the mandatory 120 day time period to conduct a hearing and render a decision on the merits of both mixed case issues was about to expire. He knew the Hand-

book prohibited the issuance of a notice of hearing after the 104th day the MSPB appeal was filed. He also knew a hearing was required to be held in 30 to 60 days after the hearing date. A39.2. So on April 6, 1995 the AJ issued an order expressing his intent to dismiss the appealed mixed case. A25. Said order stated:

> Inasmuch as the Board's normal four-month cycle is almost exhausted, and much work remains to be done, I will suggest a dismissal without prejudice, with a provision for an immediate re-filing. A21-25. .

The AJ's poor case management skills were the reason "much work remained to be done on the appeal". The AJ failed to contact the parties during the first 102 days on any matter other than the January 27, 1995 motion in Limine (December 23, 1994 to April 6, 1995). A41-42. And he took 75 days to make a final ruling on an alleged "complex legal issue", whose answer appeared on page 35 of the MSPB's Hearing Procedures Guide (Guide). A11, A16, A40.5.

On the 108th day after the MSPB appeal was filed, the AJ requested GARDNER to waive his rights to a speedy trial and decision on the merits. GARDNER refused to waive his rights, by voluntarily withdrawing his MSPB appeal and immediately refiling it, as requested by the AJ. Nor did GARDNER request a continuance because he wanted his property right of continued employment restored on the 121st day, if a hearing and decision were not rendered within the statutory 120 day period. A22.

The AJ stated he could dismiss the appeal on his own motion if GARDNER did not waive his §7702(a)(1) rights. The AJ also stated he did not view the 120 day requirements as a mandatory Congressional time limitation for mixed cases but rather as a "mere book keeping entry", which if exceeded, required him to provide status reports to his supervisors. Therefore, in total disregard of GARDNER's due process

rights, the AJ dismissed the mixed case, sua sponte, 11 days before the expiration of the 120 day limitation period.

In a July 20, 1995 Opinion and Order, the Board sustained the AJ's dismissal of the mixed case as a "procedural option" made in his sound discretion.A6-14. It found that the AJ properly dismissed the appeal and made no findings on the merits of the mixed case issues. A13. However, as stated in the petitions to the MSPB and Federal Circuit, the AJ's motive for dismissing the appeal were self-serving and reflect an abuse of discretion. The AJ's alleged dismissal of the appeal was merely a disguised continuance designed to escape the 120 day requirements. Refiling did "not trigger a new deadline for filing discovery motions" or result in any benefits to appellant commonly associated with filing a new appeal.A16. In fact, after the dismissal, GARDNER filed a protective class action appeal. The AJ denied the class action portion of the

appeal and restricted the appeal to the one originally filed on December 23, 1994.[3] A41-43.

On August 24, 1995, the Federal Circuit was petitioned to review the MSPB's dismissal of the appealed mixed case. Two years later, on June 6, 1997, the court dismissed GARDNER's petition on the basis that he bifurcated the discrimination and non-discrimination issues decided by the MSPB, citing Williams v. Dept of Army, 725 F.2d 1483 (Fed Cir.1983). However, the MSPB by its own admission stated it never decided the "merits of the appeal". A13.

The Federal Circuit confused the Equal Employment Opportunity Commission discrimination action with the undecided MSPB mixed case issues. Treasury's brief discloses the discrimination action filed on August 29, 1995 in the U.S. District Court for the Eastern District of California arose

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[3]AJ immediately acknowledged the protective appeal and set a hearing date.

pursuant to a May 30, 1995 EEOC Right to Sue Letter that was about to expire.A35-36. The district court discrimination action did not result from a bifurcated mixed case decision made by the MSPB because the MSPB never rendered a decision on the merits of the discrimination issue. A13.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Federal Circuit's decisions irreconcilably conflicts with prior Supreme Court decisions, its own decisions, and with other court of appeal decisions. Lindahl v. Office of Personnel Management, 470 U.S. 768 (1984); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Rusk v. Cort, 369 U.S. 367 (1962); Supreme Court Rules 10 a,c; Spruill at 686, 689 (MSPB is sole respondent when its procedures, rules or regulations are in issue.). Wallace v. MSPB, 728 F.2d 1456, 1459 (Fed. Cir. 1984) (The court has jurisdiction to review the MSPB's dismissal of appealed mixed cases.). The court also misconstrued

congressional intent as clearly expressed in 28 USC §1295-(a)(9), §7703(a)(2),§7703(b)(1), and §7702(a) (1). Furthermore, the Federal Circuit's actions in this case so departs from the accepted and usual course of judicial review, that it calls for the exercise of this Court's supervisory powers.

I. FEDERAL CIRCUIT CLEARLY IN CONFLICT WITH PRIOR SUPREME COURT DECISIONS.

This petition represents the fundamental procedural constitutional issue of whether the Federal Circuit must hear and consider MSPB decisions concerning "threshold matters". This Court over 10 years ago in Lindahl addressed the precise issue presented here, i.e, whether the Federal Circuit has jurisdiction to "review alleged errors of law and procedure" made by the MSPB, even though, a jurisdictional bar to review the merits of the underlying action exists. Id. at 771. This Court relied on Scroggins v. United States, 184 Ct.Cl.

530, 397 F.2d 295, cert. denied, 393 U.S. 952 (1968), which states:

> such review is available to determine whether `there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination'. Id at 297;Lindahl at 791,780-781.

The Lindahl decision held, the Federal Circuit's jurisdiction explicitly encompasses review of MSPB legal and procedural questions. Id at 797. The direct review of MSPB decisions by the court rests on the jurisdictional authority in 28 USC §1295(a)(9), affording the Federal Circuit exclusive jurisdiction to review a final MSPB decision and §7703(b)(1), providing a petition to review a final MSPB decision be filed with the Federal Circuit. Id at 770, 792-794, 796. It is clear that 28 USC §1295(a)(9) and §7703(b)(1) together provide the Federal Circuit with exclusive subject matter jurisdiction over all MSPB decisions. Lindahl at 792. And it is well estab-

lished that procedural due process prohibits the deprivation of property rights. Board of Regents v. Roth, 408 U.S. 564, 569 (1972); Cleveland Board of Education v. Loudermiller, 470 U.S.532, 545-47, 582 (1985).

Controlling case law provides,

> judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reasons to believe that such was the purpose of Congress. Abbott at 140.

This Court in Rusk stated, only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review" of administrative actions. Id.at 379-380. Even the Federal Circuit in Lindahl, acknowledged the strong presumption favoring review of administrative actions but dismissed GARDNER's petition without applying any standards, let alone, those set forth in Abbott or Rusk.

It is well established that administrative actions that

violate an agency's own procedural hearing and review regulations are invalid.A23; United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363, 388 (1957). The administrative action for which petitioner sought review by the court was: the MSPB's misinterpretation of the law,[4] its procedures,[5] rules,[6] and regulations[7]. The Federal Circuit's dismissal of the MSPB's procedural decisions for lack of jurisdiction is in direct conflict with this Court's decisions and 28 USC§1295 (a)(9). Id.

The Federal Circuit also misinterpreted §7703(a)(2), which Congress explicitly amended in 1989 for the MSPB to be named the sole respondent in every proceeding unless a

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[4] 5th amendment; 28 U.S.C. §1295(a) (9); §7702(a)(1); §7703(a)(2),(b)(1).

[5] Sua sponte dismissal of the mixed case. A37.3.

[6] Handbook, A39-40.

[7] 5 CFR including §§1201.3(a); 1201.51(a); 1201.156. A37-38

review on the merits of the underlying personnel action is sought. Amin v MSPB,951 F.2d 1247, 1251 (Fed.Cir.1991); Spruill at 683.

Here, the underlying personnel action was initiated by Treasury and that action together with the discrimination claim and all other affirmative defenses were dismissed by the MSPB on April 13, 1995. A16. The merits of neither mix case issue were decided prior to their dismissal.A13; Spruill at 689. Accordingly, the only matter before the court was the MSPB's "procedural" decision to dismiss the appealed mixed case.Id. Thus, the court's failure to substitute the MSPB as the sole respondent and to render a decision, creates irreconcilable conflicts with federal law and the law of the circuit. Hopkins v. MSPB,[8] 725 F.2d 1368,1371-72 (Fed.Cir.1984); Amin at 1250-51; Spruill, supra.

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[8] First case to hold the MSPB is the sole respondent in threshold issues.

A. **Congress Intended Federal Circuit To Review MSPB Procedural Decisions.**

Congressional intent as expressed in §7703(b)(1) and 28 USC §1295(a)(9), is for the Federal Circuit to review MSPB decisions of the law and its procedures. Lindahl at 774-775, 781, 784,791. With regard to the MPSB's procedural decisions, Congress wanted the MSPB to be the named respondent in all petitions to the Federal Circuit. Congress' dissatisfaction with the decision in Haymeyer v. Treasury, 852 F.2d 531 (Fed.Cir. 1981) "is abundantly clear" by its amendment to §7703 (a)(2). Amin, at 1251; Spruill at 684-685. Hence, neither the court's failure to name the MSPB as respondent nor its dismissal of GARDNER's petition for lack of jurisdiction was in accordance with Congressional intent. Lindahl at 786; Rusk at 379-380; Abbott at 141; Scroggins.

B. **No Contrary Legislative Intent Exists**.

No contrary legislative intent supports the Federal Circuit's refusal to review the MSPB's dismissal of the appealed mix case. In fact, Congress specifically promulgated the speedy 120 day requirements, in response to the MSPB's history of dilatory hearing practices in mixed cases and to protect employees' due process rights. P.L. 95-454, S.Rep. No. 969, 95th Cong.,2d .Sess. (1978), reprinted in U.S. Cong. & Admin. News 2723, 2873-2874. Congressional intent was to restrain the AJs' authority to dismiss a "mixed case" by requiring AJs to hear and decide both the discrimination and non-discrimination issues within 120 days.[9] supra 2783-2784; §7702(a)(1); A37.3. Furthermore, no authority exists in the federal regulations or MSPB's rules for dismissal

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[9] "Congress will exercise its oversight responsibilities should there be a systematic pattern of any body failing to meet these time frames". supra 1978 U.S. Code Cong. & Admin.New 2874.

of an appealed mixed case. Keene v Dept Interior, 47 MSPR 41, 44 (1991). The Handbook explicitly states only a continuance can be granted if appellant objects to the dismissal of an appealed agency action. A39.3. However, in the instant case, the AJ disguised a continuance as a dismissal to deliberately circumvent the mandatory 120 day hearing and decision requirements.

This Court stated the generous review provisions of the Administrative Procedures Act must be given a "hospitable interpretation". Such interpretation will only occur if this Court grants certiorari. Shaughnessy v. Pedreiro, 349 U.S. 48,51 (1954). Otherwise, the constitutional violations of the MSPB will completely escape judicial review and GARDNER will be permanently deprived of his property rights without due process of law.

II. DERELICTION OF APPELLATE DUTY TO REVIEW MPSB DECISIONS

The Federal Circuit's departure from the accepted and usual course of judicial proceeding in this case is exemplified by its total disregard for:

1. this Court's decisions in Lindahl, Rusk, and Abbott,

2. Congressional statutes such as 28 U.S.C.§1295(a)(9) and §7703(b)(1) that require review of MSPB decisions,

3. §7703(a)(2) that requires the MSPB be named respondent in procedural decisions based on its rules and regulations, and

4. the court's own precedential decisions directly on point, such as, Hopkins/Amin/Spruill; & Wallace/Ballentine v. MSPB, 738 F.2d 1244, 1247-48 (Fed. Cir. 1984).

There is a recognized duty of Article III courts to require a government agency to follow the procedural and substantive framework established in the statute and the regulations. The courts have a duty to prevent an agency from

violating constitutional rights. Dunlop v. Bachoswki, 421 U.S. 560, 567, 568 (1972). The Federal Circuit's dereliction of its duty to review MSPB decisions and reluctance to adhere to the basic tenets of judicial review have adversely affected GARDNER's rights to due process of law. Dunlop at 567-68. Furthermore, the court's decision in Gardner II is based on the Haymeyer decision which Congress expressly overruled by statute in 1989. However, despite specific legislation, the court still captions "all appeals from the MSPB ...with the agency as respondent".[10] A28. Said policy is in direct conflict with §7703(a)(2) and the court's decisions in Hopkins, Amin, and Spruill. Moreover, the MSPB's wilful circumvention of the law, the Federal Circuit's intentional misapprehension of Congressional intent, and the Federal Circuit's refusal to correct due process violations of the MSPB, consti-

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[10] In reliance on Gardner I, petitioner named Treasury as respondent in Gardner II.

tute compelling reasons for this Court to exercise its supervisory powers over the Federal Circuit.

"Jurisdiction means the right or power of a tribunal to act." Stokes v FAA, 761 F.2d 682, 685 (Fed.Cir.1985). The Federal Circuit failed to act and has no discretionary authority on whether or not to review MSPB decisions. 28 USC §1295 (a)(9); §7703(b) (1). The court's failure to accept its appellate role to review petitioned MSPB decisions leaves GARDNER no recourse, other than, seek review of the MSPB decision by this Court.

The Federal Circuit has established a pattern of arbitrarily dismissing procedural MSPB cases for lack of subject matter jurisdiction when GARDNER is the petitioner. In Gardner I the court held it lacked jurisdiction despite 1221(h) and Manning v. MSPB,742 F.2d 1424,1426 (Fed.Cir.1994). And in Gardner II,it held it lacked jurisdiction despite §7703(a)(2), (b)(1). Each of the Federal Circuit's decisions

unjustly denied GARDNER access to his right of appellate review of threshold MSPB decisions. Spruill at 683, 685; Amin at 1250-51. This Court's supervisory powers over the Federal Circuit should be exercised to prevent a permanent deprivation of GARDNER's right to appellate review of MSPB decisions, and to ensure that his statutory rights and 5th amendment rights to due process are protected.

III. IRRECONCILABLE CONFLICTS WITHIN THE FEDERAL CIRCUIT & BETWEEN CIRCUITS.

An irreconcilable conflict between different courts of appeal on the same matter of general law is a basis for review by this Court. Avoc Corp. v. Areo Lodge#35, 390 U.S. 557, 559 (1968). The Federal Circuit's refusal to determine whether the MSPB's dismissal of GARDNER's mixed case was procedurally correct, irreconcilable conflicts with the line of cases from Meehan v. USPS, 718 F.2d 1069 (Fed.Cir. 1983) to Synan v. MSPB,765 F.2d 1099 (Fed.Cir.1985).

Wallace and Ballentine are part of said line of cases. In Wallace the court specifically held it had jurisdiction to review the MSPB's dismissal of a mixed case. Id at 459. The court rejected the government's argument "that the mere pleading of discrimination [in a MSPB mixed case] totally precludes the exercise of jurisdiction by this court". And held, "An appeal on this threshold issue is not excluded by 5 U.S.C.§7703(b) and the holding in Williams." The issue decided in Wallace is precisely the same issue petitioned to the court in this case.

In Ballentine the court held,

> Until the merits of a "mixed" discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB may be appealed to this court. at 1247.

The 4th, 7th, and 10th Circuits follow the Meehan line of cases which also do not reconcile with the Gardner II decision. Christo v. MSPB,667 F.2d 882,884 (10th Cir.1981)(the MSPB must decide both mixed case issues before the case

can proceed to the next level); Afifa v. Dept of Interior, 924 F.2d 61, 63 (4th Cir. 1991); Randle v. Bentsen, 19 F.3d 371 (7th Cir. 1994).

The Federal Circuit's failure to name the MSPB as the sole respondent in Gardner II directly conflicts with the Hopkins/Amin/ Spruill line of cases. The courts of appeal that follow Spruill include the 4th, 7th, 9th, 10th, and District of Columbia Circuits. Ramey v. Bowsher, 9 F.3d 133, 136 (D.C.Cir. 1993); Afifa at 63 ("the Federal Circuit has assumed jurisdiction over what it terms "procedural or "threshold" issues); Wall v U.S. 871 F.2d 1540,1543 (10th Cir. 1989) , cert. denied,493 U.S. 1019 (1990) (Federal Circuit has exclusive jurisdiction over the Board's jurisdiction).

The entire federal appellate system relies on Federal Circuit decisions for guidance in accepting jurisdiction and transferring cases to that court. One need only compare the decisions in Hopkins and Ramey as an example of such reli-

ance. The MSPB also looks to the Federal Circuit for guidance, as evident from the growing line of cases sustaining AJs sua sponte dismissals, which now rely on Gardner v. Treasury, 68 M.S.P.R. 258 (1995) as controlling authority.[11]

This Court's review of the issues presented here, can correct the irreconcilable conflicts existing within the Federal Circuit and among the circuits as a result of the Gardner II decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 24th day of September, 1997.

Bruce E. Gardner, Esq.
Petitioner Pro Se
P.O. Box 6183
Washington, D.C. 20044
(202) 271-0552

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[11] Jones v. Dept of the Navy, 70 M.S.P.R. 221 (1996); Cloonan v. USPS, 70 M.S.P.R. 226 (1996); Deaton v. Dept of Agriculture, 71 M.S.P.R. 544, 546 (1996); Starling v. DVA, 74 M.S.P.R. 254 (1997).

United States Court of Appeals for the Federal Circuit

95-3770

BRUCE E. GARDNER,
Petitioner,

v.

THE DEPARTMENT OF THE TREASURY,
Respondent.

DECIDED: June 6, 1997

Before NEWMAN, MAYER, and SCHALL,
Circuit Judges

PER CURIAM.

This court does not have jurisdiction to hear mixed cases those involving discrimination mixed with an appealable action-from the Merit Systems Protection Board. See, e.g., Williams v. Department of the Army, 715 F.2d 1485, 1489-91 (Fed. Cir.1983). Bruce E. Gardner argues that this court has jurisdiction to hear the merits of his appeal because he filed an

action for discrimination in a district court, thereby abandoning his affirmative defense of discrimination in this appeal. However, mixed discrimination cases, such as this one, cannot be bifurcated. Id. at 1491 ("where jurisdiction lies in the district court under 5 U.S.C.§7703(b)(2), the entire action falls within the jurisdiction of that court"). Accordingly, this appeal is dismissed.

United States Court of Appeals for the Federal Circuit

95-3770

BRUCE E. GARDNER,
Petitioner,

v.

THE DEPARTMENT OF THE TREASURY,
Respondent.

ON MOTION

Before ARCHER, Chief Judge.

ORDER

The Department of the Treasury moves to reform the caption to designate the Merits Systems Protection Board as respondent. The Department of the Treasury states that Bruce E. Gardner and the Board consent. Gardner has filed a response.

Pursuant to 5 U.S.C.§7703(a)(2), the Board is designated as the respondent when its decision concerns solely the

procedure or jurisdiction of the Board. Spruill v. Merit Sys. Protection Bd., 978 F.2d 679, 686 (Fed. Cir. 1992). The agency is designated as the respondent when the Board reaches the merits of the underlying personnel action. Id. In this case, the Board dismissed Gardner's appeal without prejudice to refiling. It appears, however, that the Administrative Judge treated Gardner's stay motion as part of Gardner's removal action, the latter of which is the underlying action in this petition for review. We note that we dismissed as interlocutory Gardner's petition for review of the denial of his request for stay on the ground that it was part of the non-final proceedings concerning the removal. See Gardner v. Department of the Treasury, No. 95-3329 (Fed.Cir. June 15, 1995). Thus, the denial of Gardner's request for a stay is now reviewable within the context of this petition for review. Because the denial of a stay is grounded in the merits of the

underlying personnel action, the Department of the Treasury is the proper respondent in this petition for review.

Accordingly,

IT IS ORDERED THAT:

(1) The Department of the Treasury's motion to re-form the caption is denied.

(2) The Board's brief is due within 30 days of the date of filing of this order.

June 25, 1996

/s/
Glenn L. Archer, Jr.
Chief Judge

cc: Bruce E. Gardner
Geoffrey C. Cook, Esq.
Joyce G. Friedman, Esq.

United States of America
Merit Systems Protection Board

BRUCE E. GARDNER,
Appellant,

DOCKET NUMBER
SF-0752-95-0278-I-1

v.

DATE: July 20, 1995

DEPARTMENT OF THE TREASURY,
Agency.

Bruce E. Gardner, Esquire, Antelope,California, pro se.

Robert J. Wilson, Esquire, San Francisco, California, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Antonio C. Amador, Member

OPINION AND ORDER

This case is before the Board upon the appellant's timely petition for review of the April 13, 1995 initial decision that dismissed his appeal without prejudice to refiling within 35 days of that decision. For the reasons discussed below, we

DISMISS the agency's motion to dismiss the petition for review as moot, and DENY the appellant's petition for failure to meet the criteria for review set forth at 5 C.F.R.§12-1.115. We REOPEN this case on the Board's own motion under 5 C.F.R.§1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still dismissing the appeal without prejudice to refiling.

BACKGROUND

The appellant timely appealed to the Board's San Francisco Regional Office (regional office) from the agency's action removing him from his GS-14 General Attorney position, office of the District Counsel, Internal Revenue Service, Sacramento, California. Appeal File (AF), Tab 1. The agency based its removal action on charges that the appellant failed to file Federal income tax returns, failed to timely file State of Maryland income tax returns, and failed to timely comply with State of California automobile registration requirements. AF,

Tab 4, Subtabs 4A, 4B, 4D. In his defense, the appellant alleged, inter alia, discrimination based on race, color, religion, sex, national origin, age, and disability. See, e.g., AF, Tabs 1,3.

The administrative judge dismissed the appeal without prejudice to refiling by the prescribed time limit, finding that each party's right to a fair hearing could not be guaranteed under the Board's 120-day time limit for adjudicating appeals. Initial Decision at 1.

In his petition for review, the appellant contends that: (1) The initial decision dismissing his appeal without prejudice to refiling by the prescribed date was, inter alia, an abuse of discretion, arbitrary and capricious, and not otherwise in accordance with law; and (2) the administrative judge erred in his ruling on certain of the appellant's motions. Petition for Review (PFR) File. Tab 5. The agency has timely responded in opposition to the petition for review. PFR File, Tab 7. In its

response, it moves to dismiss the petition for review because the appellant has filed his petition for review pro se but has ot submitted a change of representative or a revocation of his designated representative. Id. The appellant has filed a reply to the agency's response. PFR File, Tab 8.

ANALYSIS

With respect to the agency's motion to dismiss, the Board's regulations at 5 C.F.R.§1201.311(a) require that parties designate their representatives in writing, that any change in representation and any revocation of a designation of representative be in writing, and that notice of the change be filed and served on the other parties. In response to the agency's motion to dismiss, the appellant has submitted a sworn declaration from his representative below, stating, inter alia, that his representation of the appellant is limited to proceedings before the Board's regional office and that he continues to represent the appellant in matters before the

regional office. PFR File, Tab 8, Declaration at 2. The record indicates that a copy of the appellant's reply and the declaration have been filed with the Board and served on the agency. See PFR File, Tab 8. Therefore, we find that the appellant has satisfied the requirements of 5 C.F.R. §1201. 31(a) and that the agency's motion to dismiss is moot. An administrative judge is required to conduct fair and impartial hearings. 5 C.F.R. §1201.41(b). Thus, an administrative judge has board discretion in controlling proceedings before him. 5 C.F.R. §1201.41(a)-41(b). **Dismissal of an appeal without prejudice is a procedural option** that is committed to the sound discretion of the administrative judge. [emphasis added]. See Padilla v. Department of the Air Force, 58 M.S.P.R. 561, 564 (1993); Zell v. Department of the Army, 57 M.S.P.R. 86, 87 (1993); Keene v. Department of the Interior, 47 M.S.P.R. 41, 44 (1991). Thus, an administrative judge has the discretion to dismiss an appeal without prejudice to refiling where

an appeal cannot be fairly adjudicated within the Board's 120-day time limit for processing appeals. See, e.g, Neubeiser v. Federal Energy Regulatory Commission, 47 M.S.P.R. 125,126-27 (1991).

Here the administrative judge based his finding that the parties could not be guaranteed a fair hearing under the Board's following factors: (1) Consumption of the first 4 months of the appeal proceeding "by a number of motions and replies dealing with various complex legal issue"; (2) existing outstanding discovery motions by both parties; and (3) the appellant's counsel's imminent commencement of a lengthy trial. Initial Decision at 1. We find that these reasons were sufficient to support the administrative judge's dismissal of the appeal without prejudice with leave to refiling at a later date. See Neubeiser, 47 M.S.P.R. at 126-27.

The appellant contends, however, that dismissal of his appeal without prejudice was still improper because he

alleged below discrimination based on "race, color, sex, and [disabling] condition" and his appeal is, therefore, a mixed-case appeal subject to the 120-day statutory adjudicatory time limit set forth at 5 U.S.C.§7702(a)(1)(B)(v). PFR File, Tab 5 at 16-19. He therefore argues that the expiration of the 120-day time limit for processing his appeal divested the Board of jurisdiction over the appeal. Id. An administrative judge may, however, in the exercise of his adjudicatory discretion, dismiss a mixed case without prejudice to refiling. See Sheehan v. Department of the Army, 43 M.S.P.R. 204, 205-08 (1990). Thus, the Board retains jurisdiction over the instant appeal.

Furthermore, we find that the appellant has not shown that he was prejudiced by the administrative judge's dismissal of his appeal. The appellant argues that his rights have been prejudiced because he is "out of work, and now out of [c]ourt, and surviving on limited resources until these injustices are corrected." PFR File, Tab at 10. The appellant,

however, has not shown that any of these situations is onerous. See Neubeiser, 47 M.S.P.R. at 128. Neither has he shown that the administrative judge's dismissal of the appeal, even if it was error, prejudiced his substantive rights inasmuch as he was afforded an opportunity to refile his appeal. See id.

Finally, because we find that the administrative judge properly dismissed the appeal without prejudice to refiling, and **there have been no findings on the merits of the appeal**, we find that the appellant's challenges of the administrative judge's rulings on his motions are premature. See, e.g., id. at 128-25.[1] [emphasis added.]. Because the administrative judge's stated time limit for refiling the appeal expired while the appellant's petition for review was pending, the appellant

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[1]In reaching our decision, we have not considered the appellant's additional arguments relating to these rulings that he raised in his reply to the agency's response because we find that these arguments were filed after the close of the record on review and do not meet the requirements of 5 C.F.R.§1201.114(i).

may refile his appeal within 35 days of the date of issuance of this decision. See Zell, 57 M.S.P.R. at 88 n.2.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R.§1201.113(c).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BRUCE E. GARDNER,
Appellant,

DOCKET NUMBER
SF-0752-95-0278-I-1

v.

DATE: April 13, 1995

DEPARTMENT OF THE TREASURY,
Agency.

Joseph L. Russell, Esquire, Sacramento, California, for the appellant.

Robert L. Wilson, Esquire San Francisco, California, for the agency.

BEFORE

Fenton H. Hughes
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed his removal from the position of General attorney (Tax), GS-14, effective Novem-

ber 26, 1994. The Board has appellate jurisdiction under 5 U.S.C.§§7511-13.

Almost the first four motions of this proceeding have been consumed by a number of motions and replies dealing with various complex legal issues. In addition, both parties have discovery motions outstanding. Finally, the appellant's attorney is about to commence a lengthy trial.

Inasmuch as the right of each party to a fair hearing obviously can not be guaranteed by adhering to the Board's normal 120-day time period for adjudicating an appeal, **the appeal will be dismissed without prejudice on the terms set forth below**.

Re-filing of the appeal will not trigger a new deadline for filing discovery motions. [emphasis added]. Rather, a ruling on the outstanding discovery motions will be made on re-filing, and according to the time table agreed to in the teleconference on April 12.

DECISION

The appeal is DISMISSED WITHOUT PREJUDICE. It may be re-filed by the appellant at any time during the 35 days following the date of this initial decision. Re-filing may be by letter directed to the undersigned, with service on the opposing attorney. **Any documents submitted in connection with this appeal should not be resubmitted with the refiled appeal.** [emphasis added].

FOR THE BOARD: /s/
Fenton H. Hughes
Administrative Judge

NOTICE OF APPELLANT

This initial decision will become final on May 18, 1995, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a

petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BRUCE E. GARDNER,
Appellant,

DOCKET NUMBER
SF-0752-95-0278-S-1

v.

DATE: April 13, 1995

DEPARTMENT OF THE TREASURY,:
Agency.

ORDER

I have the appellant's April 11 motions.

The motion for reconsideration of my ruling on issues nos. 1 and 3 is DENIED.

The motion for certification of an interlocutory appeal is DENIED, as not meeting the regulatory criteria.

The motion for clarification of my ruling on issues nos. 2, 4, 5, 6, and 7, is not unreasonable, and the clarification follows:

Issue No. 2

The disciplinary action proceeding here is not a proceeding on Federal tax issues, and the Board's decision will have no effect on the appellant's tax liability.

Issue No. 4

I do not believe that an adverse decision here will collaterally estop the appellant from contesting subsequent civil tax proceedings. In any event, where an appellant claims that a Board proceeding will adversely affect his rights in a subsequent (usually criminal) proceeding, the Board's normal remedy is to offer a dismissal without prejudice. The appellant has not availed himself of that offer here.

Issue No. 5: My comment on Issue No. 2 controls here.

Issue No. 6: Ditto.

Issue No. 7: The motion to dismiss Reason No. 1 is DENIED.

FOR THE BOARD: /s/
Fenton H. Hughes
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BRUCE E. GARDNER,
Appellant,

DOCKET NUMBER
SF-0752-95-0278-I-1

v.

DATE: April 6, 1995

DEPARTMENT OF THE TREASURY
Agency.

ORDER

This Order constitutes a ruling on the appellant's Motion in Limine. I have considered the Motion, the agency's Rebuttal, and the sections of the Internal Revenue Manual which I invited the parties to submit.

The appellant has essentially raised two issues. The first is his argument, with reference to Reason No. 1, that the Board has no jurisdiction to adjudicate Federal tax issues, such as the appropriate of his claimed deductions. In this regard, he cites Shaishaa v. Department of the Air Force, 65 M.S.P.R. 273 (1994). However, Shaishaa merely stands for

the proposition that the Board will not adjudicate a tax issue in the context of petition for enforcement. Instead, I find Micali v. Department of the Treasury, 56 M.S.P.R. 127 (1992), to be controlling. In Micali, the Board found that, "the record is sufficiently developed so as to render a remand on this question of tax law unnecessary." The Board then proceeded to interpret the Internal Revenue Code so as to define "gross income." That being the case, I believe that I have jurisdiction to adjudicate the appropriateness of the appellant's deductions here.

The appellant points out that the internal IRS appeal process concerning the validity of his deductions has not been completed, and that he has not had an opportunity to appeal to the Federal courts. **He still has the option of requesting a dismissal without prejudice until the appeal process is concluded, although I do not believe that will wish to do so.**

With reference to the IRS's burden of proof, I note that in Micali, the Board appeared to use the same standard that it does in adjudicating a charge of falsifying an official document. In order to prove a charge of falsification, an employing agency "must prove by preponderance of evidence that the appellant knowingly provided incorrect information and that he did so with the specific intent to defraud or mislead the agency." See,e.g., Harmon v. General Services Administration, 61 M.S.P.R. 327, 330 (1994).

This appears to be an appropriate standard to use in adjudicating Reason No. 1 but I will give the parties an opportunity to comment before I adopt it.

The appellant's second argument is that the IRS' use of his tax return in connection with Reason No. 1 is an unauthorized disclosure of the return. **As I mentioned before, there is no exclusionary rule in Board proceedings, but an employing agency is required to follow its own regula-**

tions. [emphasis added]. It is unclear to me which principle would apply to the IRS if it were found to have violated Federal laws dealing with tax returns. But in any event, I find no unauthorized disclosure.

Title 26 U.S.C.§6103(l)(4) authorizes disclosure of tax returns to both parties in a personnel adverse action such as that here. Such an authorization would clearly be meaningless if the adjudicator were denied access to the returns. This interpretation is supported by IRM §0751.6(8): "When an employee's own tax matters are an issue in a disciplinary action under appeal to a third party by the employee, disclosure of the employee's tax records to the third party is permissible."

I conclude, therefore, that there was no unauthorized disclosure here.

Discover was suspended by my earlier Order. The IRS has a pending motion to compel discovery, and I understand

that the appellant has filed discovery motions to which the IRS has not yet responded or objected.

After consulting Mr. Russell' secretary, and Mr. Zlizeski, acting in Mr. Wilson's absence, I have scheduled a teleconference for 11:00 a.m. on April 12. I will call both representatives at that time. The purpose of the conference is to work out a schedule for future proceedings. **Inasmuch as the Board normal four-month cycle is almost exhausted, and much work remains to be done, I will suggest a dismissal without prejudice, with a provision for an immediate re-filing.** [emphasis added]. If this is done, the case will be hear as soon as discovery is completed.

FOR THE BOARD: /s/
Fenton H. Hughes
Administrative Judge

United States Court of Appeals for the Federal Circuit

95-3770

BRUCE E. GARDNER,

Petitioner,

v.

THE DEPARTMENT OF THE TREASURY,

Respondent.

ORDER

Before NEWMAN, Circuit Judge, MAYER, Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER.

UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on July 28, unless

another time becomes appropriate under Rule 41.

FOR THE COURT,
JAN HORABLY, CLERK

Dated: June 30, 1997

by___/s/___
Alex Van Veen
Staff Law Clerk

cc: BRUCE E. GARDNER
GEOFFREY C. COOK
GARDNER v TREASURY, 95-3770
(MSPB - SF07529502781-1)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
MADISON PLACE, N.W.,
WASHINGTON, D.C. 20439

Francis X. Gindhart, Clerk

Telephone: 633-6550
Area Code 202

Bruce E. Gardner
P.O. Box 6183
Washington, D.C. 20044

August 23, 1996

Re: Gardner v. Treasury, 95-3329

Dear Mr. Gardner:

This is in response to your letter of August 21, 1996, regarding the captioning of the above appeal.

As evidenced by the June 25, 1996 order in 95-3770, pursuant to 5 U.S.C.§7703(a) (2), the Board is designated as the respondent **only** when its decision concerns the interpretation of its own jurisdiction or procedure. The agency is the proper respondent when the MSPB considers the merits of the action.

Because of this, **all appeals from the MSPB are initially captioned by this office with the agency as respondent**. [emphasis added]. Any subsequent reform of the caption may be had only upon motion of either party.

95-3229 was dismissed as premature. When your appeal was ripe for review in this court, the motion of the Department of

the Treasury to reform the caption, designating the MSPB as respondent, was denied by the June 25 order.

Sincerely yours,

/s/

Brian P. LeDuc
Associate Chief Deputy Clerk

Francis X. Gindhart, Clerk
U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

August 21, 1996

RE: **PETITION FOR REVIEW -**
DOCKET NUMBER 95-3329

Dear Mr. Gindhart:

Thank you for your prompt response to my letter of August 14th. I reviewed the enclosed Card #2 reflecting the Gardner v. Treasury caption for docket number 95-3329 and Chief Judge Archer's motion concerning docket number 95-3770 you sent me. Unfortunately, those documents do not address my inquiry, therefore, I am making a second request for an explanation of the caption change in docket number 95-3329.

Apparently, my prior letter did not clearly state my request and I will attempt to clarify them by this letter. I am not inquiring about docket number 95-3[7]70, Gardner v. Treasury. Therefore, any information regarding docket number 95-3[7]70 is not of concern to me.

My inquiry only concerns Docket Number 95-3329. When I petitioned this Court to review the decision of the Merits Systems Protection Board (MSPB) on February 28, 1995, I captioned the case Gardner v. Merits Systems Protection Board. **Exhibit A.** The Court docketed the case as 95-3329 and changed the caption from Gardner v. MSPB to Gardner v. Treasury. **Exhibit B.** I am simply requesting an explanation of why the respondent in docket number 95-3329 was changed from the MSPB to Treasury.

Once again, I appreciate your prompt attention to this matter and request your response be mailed to P.O. Box 6183, Washington, D.C. 20044.

Sincerely,
/s/
Bruce E. Gardner

Enclosure: Letter date 8/14/96
Exhibits A-C
Card #2

Francis X. Gindhart
Clerk, U.S. Court of Appeals
for the Federal Circuit
717 Madison Avenue
Room 401
Washington, D.C.20439

August 14, 1996

RE: **PETITION FOR REVIEW -**
DOCKET NUMBER 95-3329

Dear Mr. Gindhart:

The purpose of this letter is to obtain an explanation for the changed caption in the above reference docketed petition from Gardner v. Merits Systems Protection Board (MSPB) to Gardner v. Treasury. Enclosed and marked as **EXHIBIT A** is the first page of said petition for review reflecting the MSPB as the respondent and the Federal Circuit's subject matter jurisdiction pursuant to 5 U.S.C.§ §7703 and 1221(h). Also enclosed and marked as **EXHIBIT B** is the notice of docketing.

The above reference[d] petition involved a review of the MSPB's denial to review Mr. Gardner's interlocutory stay request (**STAY**) because of a lack of subject matter jurisdiction over the Administrative Judge's (AJ) decision. **EXHIBIT C**. 5 U.S.C. §7703, §1221(h), 5 C.F.R. §1209.6(b) and this Court in Manning v. MSPB, 742 F.2d 1424, 1426 (Fed.Cir. 1994), all recognize petitioner's right to a separate hearing on an agency's conduct in retaliatory removals based on protected whistleblowing disclosures. In addition, Chapter 15 of the MSPB's Judge's Handbook, entitled "Whistleblowers Appeals" acknowledges the MSPB has subject matter juris-

diction in whistleblower appeals pursuant to 5 U.S.C.§ §1214(a)(3) and 1221(a)(c)(1).

The MSPB's appellate jurisdiction over the **STAY** denial and Mr. Gardner's right to a separate **STAY** hearing prior to his removal proceeding were the primary issues in this case. Spruill v. MSPB, 978 F.2d 679, 683 (Fed.Cir. 1992). The Federal Circuit in Spruill stated, "The question of what are the controlling criteria for determining the proper party is the same question whether the appeal comes to us under the authority of §7703 or §1221. Id. at 685. This Court applied the Hopkins rule that "a situation involving purely the MSPB's own responsibility or involvement whatsoever, logic dictates that Congress intended the MSPB to be named respondent, and that the exception for agency, a mere bystander in this case, does not apply. Hopkins v. MSPB, 725 F.2d 1368 (Fed.Cir.1984); Amin v. MSPB, 951 F.2d 1247 (Fed.-Cir.1991).

In the above referenced petition, the MSPB had sole responsibility for denying the whistleblower's **STAY** request and the MSPB should have remained the respondent. Treasury was not involved in the AJ's decision to deny the **STAY** and a separate hearing on the whistleblowing issues. Based on the facts, issues and law surrounding the above referenced petition it appears the MSPB was the correct respondent.

Kindly explain why the caption was changed showing Treasury as the respondent. I would appreciate your written

response within 10 days from the date of this letter. Your response should be mailed to P.O. Box 6183, Washington, D.C. 20044.

Sincerely,

/s/

Bruce E. Gardner

Enclosures: Exhibits A-C

EXCERPT FROM

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE E. GARDNER,

Plaintiff, CASE NO: CIV-S-95 1570 EJG GGH

vs.

ROBERT E. RUBIN, Secretary of the Treasury, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, Office of Chief Counsel, BENJAMIN C. SANCHEZ, STEVEN MOPSICK and NEAL ABREU,

Defendants.

ADMINISTRATIVE REMEDIES

9. Plaintiff brings this action pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C .§2000e-16(c), for damages to compensate Plaintiff for the economic loss and other damages caused by Defendant's

unlawful employment practices committed against Plaintiff because, among other things, Plaintiff is an African-American.

10. Plaintiff has exhausted his administrative remedies, by filing a complaint of discrimination with the U.S. Equal Employment Opportunity Commission against Defendants on or about June 13, 1994.

11. The U.S. Equal Employment Opportunity Commission issued a Notice of Right to Sue letter on May 30, 1995. (Exhibit "A")

12. The Defendants' practices in violation of Title VII of the Civil Rights Act continue to occur with respect to Plaintiff from January 7, 1991, until November 26, 1994. These occurrences are sufficient to satisfy the jurisdictional prerequisites of Section 706(d)[42 U.S.C.§2000e-16(c)].

MERIT SYSTEM PROTECTION BOARD'S REGULATIONS INVOLVED

1) 5 C.F.R.§1201.3(a) states in part:

> The Board has jurisdiction over appeals from agency actions when appeals are authorized by, rules, or legislation.

2) 5 C.F.R.§1201.51(a) states in part:

> The hearing will be scheduled not earlier than 15 days after the date of the hearing notice ...

3) 5 C.F.R.§1201.156 states in part:

> When an appellant alleges prohibited discrimination in the appeal, the judge will decide both the issue of discrimination and the appealable action within 120 days after the appeal is filed.

4) 5 C.F.R.§1209.2 states in part:

> Jurisdiction
> (a) Under 5 U.S.C.§1214(a)(3), an employee, former employee ... may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.
>
> (b) The Board exercises jurisdiction over:
>
> > (1) Individual right of action appeals
> > These are authorized by 5 U.S.C.§1221(a) with respect to personnel actions listed in §1209.4(a) of the part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.

5) 5 U.S.C.§1221(h) states in part:

> (1) An employee, former employee ... adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.
>
> (2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b)(1).

MERIT SYSTEM PROTECTION BOARD'S RULES INVOLVED

1) MSPB Judge's Handbook, Chapter 3, page 6 states:

> Acknowledgment Orders
> a) Time Requirement ... an acknowledgment order must be issued to the parties within 3 working days of receipt of the appeal...

2) MSPB Judge's Handbook,Chapter 4, page 1, paragraph 4:

> The hearing may not be scheduled earlier than 15 days from the date of the notice [of the hearing]...
>
> ... the AJ should usually provide 30 to 60 days' notice of the hearing date. Optimally, the hearing will be held within 75 days of the date of receipt of the appeal.

3) MSPB Judge's Handbook, Chapter 4, page 3, states:

> The AJ should consider, inter alia, the requirements of due process ... and the requirements of expeditious case processing.
>
> An AJ should not grant ... a dismissal without prejudice when the appellant objects. Instead, a continuance should be granted ...

4) MSPB Judge's Handbook, Chapter 8, page 3 states:

> (7)(a) Initial Discovery Requests.
> Discovery requests must be initiated within 25 days after the date of issuance of the acknowledgment order.
>
> (e) Completion of Discovery. Discovery should be completed within the time designated by the AJ. 5 C.F.R.§ 1201.73(d)5. The AJ must ensure that due process requirements are met.

5) MSPB Hearing Procedures Guide, page 35

> Added to these recognized common law privileges, Board cases may involve other claims of privilege, confidential information, including...the sanctity of taxpayer records collected by the Internal Revenue Service.

EXCERPT FROM PETITIONER'S BRIEF TO FEDERAL CIRCUIT

BRUCE E. GARDNER,
Petitioner,

v.

Docket #
95-3770

Department of the Treasury,

Respondent.

BRIEF OF PETITIONER BRUCE E. GARDNER

2. Appeal of Termination Action

On December 23, 1994, Mr. Gardner appealed his removal to the Board. **A67-83.** However, the Board's attested list shows this APPEAL was acknowledged on December 19th a week before it was actually filed. In addition, the Board's attested index also incorrectly states the APPEAL was filed the same day it was acknowledged, December 19th. The Board's attested index does not reflect it received any

documents after December 19th or issued any orders related to the APPEAL.

On April 13, 1995, the AJ dismissed the Appeal sua sponte with a right to refile. On May 15, 1995 the AJ's dismissal was petitioned to the Board. On July 20, 1995, in a published opinion, the Board sustained the AJ's sua sponte dismissal on the basis of judicial discretion. On August 23, 1995 Mr. Gardner timely filed a petition of review with this Court.

On August 24, 1995, Mr. Gardner filed a "protective mixed class" (PROTECTIVE APPEAL) with the AJ pursuant to 5 C.F.R.§1201.27(b). **A175-176** Five days later the AJ acknowledged the APPEAL, 54 days later the class appeal portion of the PROTECTIVE APPEAL was dismissed by the

AJ[2], and the AJ simultaneously set a December 5, 1995 hearing date on the

remaining PROTECTIVE APPEAL.**A177-185** This December 5th hearing date was subsequently dismissed once the AJ realized the PROTECTIVE APPEAL was only a "protective appeal". ...

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[2] The AJ only has 30 days to issue an order regarding the class appeal. If the class appeal was denied petitioner has 35 days to file an individual Appeal. 5 C.F.R.§1207.27(b).